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IN THE

# Supreme Court of the United States

October Term, 1965

No. 430

UNITED STATES OF AMERICA, *ex rel.*,
CHUNG LEUNG, *Relator-Appellant,*

AGAINST

P. A. ESPERDY, as District Director of the Immigration Service for the District of New York, or such person, if any, who may have the said CHUNG LEUNG in custody, *Respondent-Appellee.*

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UNITED STATES OF AMERICA, *ex rel.*,
HSU MIO JOHN, *Relator-Appellant,*

AGAINST

P. A. ESPERDY, as District Director of the Immigration Service for the District of New York, or such person, if any, who may have the said HSU MIO JOHN, in custody,

*Respondent-Appellee.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgments of the United States District Court for the Southern District of New York.

## Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1965. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Involved

1. May the Attorney General give the Special Inquiry Officer more authority than the Special Inquiry Officer is limited to under the Statute?

2. Is the country of deportation a determination of deportability?

3. Is the naming of the country of deportation by the Special Inquiry Officer an enforcement function?

4. Does the granting of the power to the Special Inquiry Officer of the naming of a country of deportation defeat the basis fairness and constitutionality of the deportation hearing?

## Statute Involved

Section 242 (b) 8 U. S. C. 1252:

> "A Special Inquiry Officer shall conduct proceedings under this Section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders fo deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a

special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceedings, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceeding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

## Regulations Involved

Section 242.8 (a)—*Authority*:

"In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section 242 (b) of the Act; to reinstate orders of deportation as provided by section 242 (f) of the Act; to determine applications under sections 244, 245, and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243 (a) of the Act; to order temporary withholding of deportation pursuant to section 243 (h) of the Act, and to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act."

Section 242.18 (c)—*Order of the Special Inquiry Officer*:

"The order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The special inquiry officer is authorized to issue orders in the alternative or in combination as he may deem necessary."

## The Facts

Petitioners were both born on the Mainland of China and came to the United States as crewmen. Since their arrival in the United States, they have continuously remained in this country, being unable to obtain shipping employment to ship foreign. That after their respective arrival, each was apprehended by the Immigration Service and were afforded deportation hearings. Their deportation hearings were conducted by the Special Inquiry Officers. The Special Inquiry Officer in the case of Chung Leung, named Hong Kong as the country of deportation in the deportation order which he entered. The Special Inquiry Officer in the case of Hsu Mio John, designated Formosa as the country of deportation in the deportation order.

Appeals were then taken to the Board of Immigration Appeals where the aliens contended that the Special Inquiry Officers had no authority to name any country in the deportation orders, because the Special Inquiry Officers' power is limited under Section 242 of the Immigration and Nationality Act, 8 U. S. C. 1252 and, that the Regulations numbered 8 C. F. R. 242.8 (a) and 8 C. F. R. 242.18 (c) were invalid in that they exceeded the authority of Section 242 of the Immigration and Nationality Act of 1952, as amended.

When the Board of Immigration Appeals dismissed the appeals, the instant Writs were brought on by the appel-

lants. On the hearing of the Writs, the District Court (Cashin, D. J.) dismissed the Writs but suggested that the cases be taken upon appeal. That thereafter, the instant appeals were taken and the aliens were released on bond pending the hearing and determination of the appeals.

On appeal to the United States Court of Appeals for the Second Circuit, the judgments were affirmed.

## Why Certiorari Should Be Granted?

### I

The decision below raised important questions of law with reference to the deportation procedure and more particularly to the propriety of the deportation hearing and the enforcement of the Immigration laws. The first question and most important one is whether the powers of the Special Inquiry Officer can be increased by the Attorney General so as to give the Special Inquiry Officer more authority then he is permitted to have pursuant to statute.

The Special Inquiry Officer is a creation of the Statute and, pursuant to statute, he is to be an impartial officer who is not directly under the control of the Attorney General, and thereafter, free to make unbiased determinations with reference to the deportation of aliens in the United States.

The powers and limitations of the Special Inquiry Officer are specifically spelled out in Section 242 (b), 8 U. S. C. 1252 (b), Specifically a "Special Inquiry Officer shall conduct proceeding under the Section To Deter-

MINE THE DEPORTABILITY of any alien * * *." The Special Inquiry Officer does not fix bond of any alien who is detained nor does he have the power to determine the time in which an alien can leave the United States pursuant to an order of voluntary departure; he has the power to determine deportability solely. The naming of a country of deportation is an independent of the determination of whether or not an alien is illegally in the United States. The country of the alien's citizenship or where he comes from has no bearing upon the alien's illegal status in the United States. In fact, the country of deportation is controlled not by Section 242 (b) of the Immigration and Nationality Act, but is contained in Section 243, 8 U. S. C. 1253 of that Act.

It is also significant to note that although Section 242 (b) mentions only the Special Inquiry Officer, Section 243 mentions only the Attorney General. "The deportation of any alien in the United States * * * shall be directed by the Attorney General."

The Attorney General no doubt has the power to delegate his authority to innumerable officers of the Immigration Service but he does not have the power to designate such authority to a Special Inquiry Officer who is supposed to be impartial and a person who has no dealings with the prosecuting and enforcement functions of the Service:

> "Section 242 (b), 8 U. S. C. 1252 (b) * * * no special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions."

The country that an alien is deported to is an enforcement proceeding; it is carried out by the deportation

branch of the service. There is no provision in the Statute for the Special Inquiry Officer to merge part of his hearing with the deportation branch of the Immigration Service. In fact, it is imperative that the two sections of the Service be kept separate and apart, so that the integrity of the office of the Special Inquiry Officer be maintained. It is a basic concept of law that deportation statutes must be strictly construed. A loose construction by the attorney general and the Courts is not warranted where the statute specifically enumerates the powers of the Special Inquiry Officer and separates them from the powers given to the Attorney General as is applicable in the instant case. Section 242 limits the authority of the Special Inquiry Officer to determine deportability. In a separate Section 243, the Attorney General or his delegate is required to determine the country to which an alien is to be deported.

II

The granting of the power to the Special Inquiry Officer of determining the country of deportation by the Attorney General's delegation to him of this authority conflicts with the theory that an alien is entitled to an impartial hearing under the laws and constitution of the United States. The prior history of the deportation hearings is significant with reference to this matter. Before 1952, the deportation hearing was conducted by officers of the Immigration Service. There was no requirement that the hearing officers had not participated in the investigative functions of the Service nor in the enforcement branch of the Service. A challenge was made to this type of hearing and in the case of *Sung* v. *McGrath*, 339 U. S. 33, 70 S. Ct. 445, the Court held that deportation hearings must satisfy the currently prevailing norms of fairness and it was determined that a hearing officer

who participated in investigative and prosecuting functions was not a proper party to conduct a fair hearing. The Immigration and Nationality Act of 1952 and the creation of the Special Inquiry Officer were a result of the *Sung* and other cases. The Special Inquiry Officer's powers were limited to insure that aliens illegally in the United States would receive fair hearings. Shortly after the passage of the 1952 Act, the Special Inquiry Officer merely determined the question as to whether or not an alien was illegally in the United States. The orders of the Special Inquiry Officer dealt solely with this problem and made no mention of the country to which an alien was to be deported to.

In 1961, the Congress passed Section 8 U. S. C., 1105 (a) (Section 106 of the Immigration and Nationality Act of 1952) which provided for a direct judicial circuit review of all final orders of deportation. Thereafter, the Regulations challenged in the instant case were promulgated by the Attorney General. The purpose of these regulations was to limit the litigation of aliens who felt aggrieved by orders of the Immigration Service. Apparently, it was felt that by giving the Special Inquiry Officer more power, it would limit the judicial review for aliens. However, the judicial review bill of 1961 did not change the power of the Special Inquiry Officer nor did it eliminate the requirement that an alien be given a fair hearing.

Can the hearing be fair if in the course of the same hearing an alien makes an application for voluntary departure and is also questioned with reference to the place or places to which he is to be deported to? Can a Special Inquiry Officer separate in his mind and ignore any challenge to the place of deportation an alien might make when the Special Inquiry Officer is considering a

discretionary application such as voluntary departure, where an alien might make a challenge to the country of his deportation in the same hearing. The instant cases are perfect examples, when the aliens challenged the regulations giving the Special Inquiry Officer the power to direct the country of deportation.

The hearing is not fair when the officer who decides on deportability and discretionary relief, also determines the country of deportation. This can be more clearly seen in the case where the Attorney General has the discretion to choose any country which is willing to accept the alien into its territory as the country of deportation. The Attorney General has this power under Section 243 (a)(7), 8 U. S. C. 1253 (a)(7). Certainly, the Special Inquiry Officer would have to make his determination under Section 243 (a)(7), pursuant to the request of an officer of the Attorney General because, at the time of the hearing the Special Inquiry Officer would not be in possession of the information as to which countries would accept a possible deportee. When the Special Inquiry Officer would make a determination pursuant to Section 243 (a)(7), he would not be acting as an impartial judge but as a direct arm of the deportation branch of the Immigration Service. He would have to rely on material not of record and, of course, on evidence that might not be admissible at a due process hearing. There are many pitfalls and dangers in enlarging the power of the Special Inquiry Officer to include an enforcement function, especially where it is not assigned to the Special Inquiry Officer by the statute and, even if it were assigned to the Special Inquiry Officer by the statute, its constitutionality would certainly be subject to question.

## CONCLUSION

**Wherefore in consideration of the magnitude of the questions presented and in the interests of justice it is respectively prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.**

Dated: New York, N. Y.
August 4th, 1965.

Respectfully submitted,

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